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Whistleblower Wins Appeal

N.Y. court rules attorney can't be fired for reporting dishonest colleague

Lawyers who blow the whistle on unethical colleagues are more honored in theory than in practice. After all, whistleblowers shake up the status quo and cause problems. Still, as George Bernard Shaw once observed, "All progress depends on the unreasonable man."

Howard Wieder, a Manhattan attorney and determined whistleblower, won a major victory in the New York Court of Appeals on Dec. 22 after a five-year trek through the state's court system. The state's high court, in the first decision of its kind in the United States, held 5-0 that lawyers who follow the requirements of the professional disciplinary rules and report dishonest colleagues cannot be fired in retaliation.

The decision represented a break from past rulings in which the court declined to protect corporate whistleblowing employees, said Seth Rosner, chair of the ABA Standing Committee on Professionalism. "I think it demonstrates that this court is concerned about lawyer discipline," he said.

Legal ethics professors, virtually all of whom had supported Wieder's position, were exhilarated by the court's decision, which reversed two lower court rulings.

"This opinion is the first volley in an effort to extend protection for lawyers who may suffer retribution when they comply with their ethical obligations," predicted Stephen Gillers, a professor at New York University School of Law.

Wieder, a 39-year-old commercial litigator, started as an associate with the New York City firm of Feder, Kaszovitz, Isaacson, Weber and Skala in 1986. While working at the firm, another associate, Larry Lubin, was assigned to handle the closing for Wieder's $340,000 apartment. Wieder alleges that Lubin never did the work and engaged in a pattern of misconduct, including the forging of firm checks.

From the point he made those discoveries, said Wieder, he implored the firm's partners to report Lubin's conduct. "I told the partners day by day for three months that they had an obligation to inform the state bar disciplinary committee," he recalled.

The firm saw the situation otherwise. "This was not some kind of a Watergate situation," said partner Murray Skala. "This was a dispute between two associates in a firm." But finally, with Wieder's prodding, the firm reported Lubin in December 1987 to the disciplinary authorities. Wieder was fired in March 1988.

Wieder, not easily discouraged, filed suit against his former law firm and Lubin. "I'm the first-born child of two sole survivors of the Holocaust," he said. "That fact is part of the historical mix in my background that motivates my quest for justice."

Howard Wieder: Being a child of Holocaust survivors "motivates my quest for justice."

Wieder noted in his case that under New York law, as in most states, a lawyer has a duty to report information that "raises a substantial question as to another lawyer's honesty, trustworthiness or fitness."

The case took a toll on Wieder, who is now a lawyer with Harvis, Trien & Beck in Manhattan. He was unemployed for nine months and spent $150,000 on the litigation. He was fortunate, though, to receive substantial pro bono help on appeal from a well-known mother-and-son legal team: David Vladeck, acting director of the Public Citizen Litigation Group, and New York employment lawyer Judith Vladeck.

Officers of the Court

In December, Wieder's gamble paid off. The New York Court of Appeals held that the right of employers to fire employees at will for nondiscriminatory reasons did not apply to lawyers who had a duty to report wrongdoing. "Associates are, to be sure, employees of the firm but they remain independent officers of the court, responsible in a broader public sense for their professional obligations," wrote Judge Stewart Hancock Jr. The judges remanded Wieder's case for trial.

The opinion, which legal experts believe will prove persuasive to other state courts, removes a powerful incentive for lawyers to keep colleagues' wrongdoing secret. "Until now, lawyers faced a Hobson's choice," said David Vladeck. "They could either report and face economic retaliation, or they could remain silent and face disbarment."

Wieder's former law firm, which denies that it fired him in retaliation for his whistleblowing, disagrees with the court's opinion. Said Skala: "We have a mechanism in place for the policing of attorneys through the disciplinary committee. I have trouble understanding why a law firm can fire a secretary at will but can't fire a lawyer in that situation."

But ethics specialists disagree. "The idea that you don't squeal or rat on another lawyer is an ethic for the schoolyard or the alley, and not for a learned profession that exists for the public interest," said Professor Monroe Freedman of the Hofstra University School of Law.

Leonard Gross, a professor of legal ethics at Southern Illinois University School of Law in Carbondale, Ill., saw the Wieder case as a teaching tool. At the invitation of Gross, who filed an amicus brief in support of Wieder with 11 other ethics and labor law professors, Wieder spoke with the teacher's 60-student professional responsibility course by conference call. Said Gross, "I wanted my class to know that there's more to practice of law than making money."

—*Andrea Sachs*

Should New York's "Whistleblower" Statute be amended to protect an attorney from retaliatory discharge from his job for reporting misconduct by another attorney? Several issues must be examined when an attorney is dismissed for reporting misconduct by another attorney in his law firm. First, is the issue of the employment-at-will doctrine and whether it is applicable to attorneys who are dismissed because they are obligated to report wrongdoing in the profession. The second issue deals with professional responsibility and legal ethics which attorneys are required to abide by or face the possibility of having their licenses suspended or revoked. Finally, since attorneys are officers of the court, should the courts and not the legislature regulate the terms of their employment and exempt them from dismissal for whistleblowing?

Wieder v. Skala,[1] a recent Supreme Court of New York case, has raised these issues, without giving satisfactory answers. Mr. Wieder, a former associate of defendant law firm, Feder, Kaszovitz, Isaacson, Weber & Skala, was allegedly terminated from his employment for reporting the unethical activities of an associate attorney he alleges was dishonest. His colleague Larry Lubin, who was representing him in the purchase of a condominium, claimed to have obtained a mortgage commitment when in fact he had never even spoken with the bank

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[1] 144 Misc.2d 346, 544 NYS2d 971 (Sup. Ct. 1987), aff'd., 562 NYS2d 930 (App. Div. 1990)

he said he had gotten it from. When Mr. Wieder complained to his superiors, they offered to reimburse him for the additional expenses involved and asked for his understanding, but refused to report the Mr. Lubin to the appropriate disciplinary committee. Mr. Lubin later signed a written statement admitting "that he had misled several clients, including Mr. Wieder, and that he had signed firm checks without authorization".[2] Only after Mr. Lubin left defendant law firm did they report this misconduct to the Departmental Disciplinary Committee. Finally, Mr. Wieder was terminated which he alleges was in retaliation for reporting Mr. Lubin's misconduct.

The Supreme Court of New York, New York County decided against Mr. Wieder, on his claim for wrongful termination. The decision was based upon The "Whistleblower Law",[3] which states that "an employer shall not take retaliatory personnel action against an employee ... who discloses or threatens to disclose .... an activity, policy of practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific

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[2] Margolick, Lawyer Says His Case Pits Ethics v. Right to Dismiss, New York Times, November 13, 1989 at page B1

[3] N.Y. Lab. Laws @ 740, McKinney's (1991).

danger to the public health or safety".[4] Since the refusal to report the misconduct of Mr. Lubin did not pose "a substantial and specific danger to the public health or safety",[5] the court stated that the Whistleblower Law did not apply and Mr. Wieder was not terminated in retaliation for reporting the misconduct. The court did note that the issue was one of first impression in the state but held that application of the employment-at- will doctrine was no different for an attorney than any other employee.[6]

What is left by this decision is a dilemma for all attorneys. If they fail to report misconduct, they are subject to disciplinary action under the Code of Professional Responsibility. If they report the misconduct, they risk being dismissed from their job. Further, if they take action against their employer for retaliatory discharge under the Whistleblower Law, the probability is that they may lose and not only incur their own legal costs, but their ex-employer's attorney fees as well, as permitted by law. And of course, they would still be unemployed, ~~which in today's job market, could be quite detrimental, not to mention~~ with a the stigma associated with the reason for leaving their prior employment.

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[4] Wieder, 144 Misc.2d 346, 348, citing NY Lab. Law @ 740, subdivision 2.

[5] Id.

[6] Id., at 347

The New York Courts have done little to protect employees who are not covered by a contract - those whose employment is at-will. Historically, the doctrine of employment-at-will was based on a Nineteenth Century treatise on the master-servant law by Horace Gray Wood, an Albany based attorney, which stated:

> "With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at-will, and if the servant seeks to make it out a yearly hiring the burden is upon him to establish by proof ... [I]t is an indefinite hiring and is determinable at the will of either party, and in this respect there is no distinction between domestic and other servants."[7]

The original purpose of this doctrine was to allow both the employer and the employee the freedom to make contracts to suit their needs, leaving either party free to terminate the work relationship at any time. Although Wood did not cite case law or policy grounds to support his doctrine, nor did he accurately reflect the usual duration of contracts during this period, his work was considered to be that of a genius. His treatise was so uniformly accepted that the U.S. Supreme Court "found constitutional underpinnings for it in the Due Process Clause".[8] The Supreme Court has since abandoned this position

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[7] Minda, Time for an Unjust Dismissal Statute in New York, 54 Brooklyn L. Rev. 1137, 1141 (1989), citing The Law of Master and Servant @ 134 (1877)

[8] Partee, Reversing the Presumption at Will, 44 Van. L. Rev. 689, 693, April 1991. (see Coppage v. Kansas, 236 U.S. 1 (1915), [striking down a state statute prohibiting firing of union members as violative of due

in favor of judicial exceptions to employment-at-will based upon tort and contract principles.

It is still standard law in New York that absent an agreement which establishes a fixed duration, any employment relationship is presumed to be hiring at-will, terminable by either party.[9]

Recent legal action has shown the public's growing disfavor with this law. In most situations, the employer has the upper hand in controlling the terms and conditions of employment because he is aware that most employees do not have the financial resources nor mobility to easily change positions. This changing public attitude shows the current belief to be that although an employee can quit at any time, an employer should not be able to terminate an employee at any time for any reason. "They argue that, due to unequal bargaining power, workers are unable to obtain job security provisions through individual contracts, and thus need a general provision allowing only just cause dismissals".[10] This belief is based upon the general principle that in every

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[9] Martin v. New York Life Ins. Co., 148 NY 117, 121, 42 NE 416 (1895)

[10] Note, Employer Opportunism and the Need for a Just Cause Standard, 103 Harv. L. Rev. 510, 510-11, 1989-90

contract is an implied covenant of good faith and fair dealing.[11] To terminate an employee without good cause does not appear to hold true to this covenant, nor create a secure feeling for the employee. As the employment relationship ages, an employee expects that his employment will continue and that the job becomes "property" - [a] profession or job is frequently far more valuable than a house or bank account, for a new house can be bought, and a new bank account created, once a profession or job is secure."[12] Therefore an employee's interests need to be protected against wrongful termination as [i]t is fundamentally inconsistent to allow

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[11] See Restatement (Second) of Contracts s 205 (1989)

[12] Minda, The Common Law of Employment At-Will in New York: The Paralysis of Nineteenth Century Doctrine, 36 Syracuse L. Rev 939, 963 (1986), citing Reich, The New Property, 73 Yale L. Journal 733, 738 (1964). See Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) - "An employee has a constitutionally protected property interest in his or her job if that employee has a reasonable expectation or a "legitimate claim of entitlement" rather than merely a "unilateral expectation" of continued employment".
See also, Gross, Ethical Problems of Law Firm Associates, 26 Wm. & Mary L. Rev. 259, 261 at FN5 (1985) - "Because of the transaction costs that are involved in negotiating and drafting a contract, most employment contracts, including those between law firm partners and associates, are not in writing...If it is anticipated that the relationship will last for an extended time either because the associate will become difficult to replace or because the job market will become limited, the value of a written agreement can exceed the transaction costs." See W. Klein, Business Organization and Finance - Legal and Economic Principles (1980)"

employers to reap the benefits of long-term employee service and escape all responsibility for respecting legitimate employee expectations created in reliance upon the employee relationship".[13]

Relying on Wood's rule, "the New York Court of Appeals has consistently refused to recognize the need for further modifications of its own rule absent legislative mandate".[14] The only exception to this generalization is where the courts have found an implied contract to exist and therefore the employment was not at-will. In Weiner v. McGraw-Hill, Inc.,[15] the Court of Appeals held that the plaintiff was able to show that the defendant and plaintiff had made reciprocal promises at the time he accepted employment which were enough to constitute an implied contract, and therefore based upon their course of conduct, that the parties had in effect entered into a contractual relationship. Judge Fuchsberg noted in this decision that "there is growing support for remedial legislative action",[16] but deferred to the legislature for any change. The result of the Weiner decision has been problematic in that it has not been useful in later

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[13] Minda, 36 Syracuse L. Rev. at 965

[14] Minda, 54 Brooklyn L. Rev. at 1141

[15] Wieder, 443 N.E.2d 441, 457 NYS2d 193 (1982)

[16] Id. at 444

decisions because the plaintiffs have failed to establish identical fact patterns and the courts have refused to extend its interpretation to other situations.[17] Because of this explicit and difficult pleading burden, post-Weiner plaintiffs alleging wrongful discharge have not fared well. The fear of the dissenting judges in Weiner, (and in later decisions which have also supported the employers' position[18]) is that if additional restrictions are placed on employers regarding their ability to discharge employees, they may move their business to another state with less restrictions.[19] So to keep business in New York based on political and economic reasons, the courts consistently favor the employers, while disadvantaging the work force.

Finally, in 1984, New York passed the "Whistleblower Law" in response to criticism of the at-will doctrine. Whistleblowing has generally been defined as the act of someone "who believing that the public interest overrides the interest of the organization he serves, publicly 'blows the

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[17] See, Patrowich v. Chemical Bank, 98 AD2d 318, 470 NYS2d 599 (1984), [claim dismissed because the language relied on was not sufficient to establish an express agreement]; Rizzo v. Int'l Bd. of Teamsters, 109 AD2d 639, 486 NYS2d 220 (1985), [claim dismissed because employee failed to establish detrimental reliance on the assurance of job security]

[18] See Sabetay v. Sterling Drug, Inc., 69 NY2d 329, 514 NYS2d 209, 506 NE2d 919 (1987)

[19] Weiner, 58 NYS2d at 468-9

whistle' if the organization is involved in corrupt, illegal, fraudulent or harmful activity".[20] However, as previously stated in the Wieder decision, Labor Law @ 740 only covers termination of an employee who reports a violation which "presents a substantial and specific danger to the public health or safety".[21] The problem with this law is that it is too narrow in scope to protect most employees and is difficult to prove. In addition, it requires the employee in the private sector to first report the problem to their superiors and give them a chance to correct the situation. If the employee is then terminated, under the Whistleblower Law, the employee must prove to the court that "(1) there is a law; (2) which has been violated, and (3) which creates a substantial and specific danger to public health and safety".[22] The criterion as to what is "a substantial and specific danger to public health and safety"[23] is a tough standard to meet. For

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[20] Annotation, Federal Pre-Emption of Whistleblower's State-Law Action for Wrongful Retaliation, 99 A.L.R. Fed 775, quoting, Ralph Nadar, Peter Petkas and Kate Blackwell, eds., Whistleblowing: The Report of the Conference of Professional Responsibility (New York: Grossman Publishers, 1972, p.6

[21] 144 Misc.2d at 348

[22] Minda, 54 Brooklyn L. Rev. at 1184

[23] Id.

example, in Remba v. Fed'n Employment & Guidance Serv.,[24] fraudulent billing practices was not considered a violation which met this standard. Nor were fiscal improprieties of an association which aided retarded children.[25] Even erratic behavior by a building manager which posed a danger to the tenants in the building did not qualify as a valid claim under the Whistleblower Statute.[26] The constricted nature of the New York statute was commented on by a Federal Court in Littman v. Firestone Tire & Rubber Co.[27] Plaintiff had alleged fraudulent activities by Firestone employees and that he had been terminated for reporting the violations. The defendant was an Ohio corporation, the plaintiff was a New York resident employed by the New Jersey office. The court stated:

> "The choice of law issue is important because plaintiff would not be able to maintain a claim under either New York or Ohio law ... New York, by statute, affords a limited cause of action for employees who disclose or

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[24] 76 NY2d 801, 559 NYS2d 961, 559 NE2d 655 (1990)

[25] Lamagna v. New York State Ass'n for Help of Retarded Children, Inc., 158 AD2d 558, 551 NYS2d 556 (1990) (See also Vella v. United Cerebral Palsy of New York City, Inc., 141 Misc2d 976, 535 NYS2d 292 (1988) (plaintiff discharged for reporting purchases which violated the Not-for-Profit Corporation Law, but did not fall within the meaning of the Whistleblower Law)

[26] Connolly v. Harry Macklowe Real Estate Co., Inc., 161 AD2d 520, 555 NYS2d 790 (1990)

[27] 709 F.Supp. 461 (1989)

> threaten to disclose an employer's activity that is in violation of a law which violation creates and presents a substantial and specific danger to the public health or safety. (N.Y. Labor Law @740(2)(a) (McKinney 1988). Plaintiff's complaint neither alleges nor could allege any danger to the public health or safety sufficient to make out a claim under New York law as it concerns pure fraud practiced against defendant by its employees".[28]

Although it was apparent to other jurisdictions that New York was extremely limited in its recognition of exceptions to the employment-at-will doctrine, New York was not ready to change.

In Murphy v. American Home Products Corp.,[29] the court once again upheld Wood's Rule and refused to recognize an action for wrongful discharge for cases involving employment-at-will and refused to recognize the implied covenant of good faith and fair dealing in contract law when applied to employment contracts, stating that such "a provision ... would be destructive of [an employer's] right of termination".[30] The plaintiff in Murphy alleged he had been fired for disclosing to management certain accounting improprieties which allowed certain officers to receive monies to which they were not entitled. Mr. Murphy did not have an employment contract and alleges he was terminated unjustly and without cause. The court acknowledged that exceptions to the at-will

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[28] Id. at 469

[29] 448 NE2d 86, 58 NY2d 293, 461 NYS2d 232 (2nd Dept. 1985)

[30] Id. at 91

doctrine existed in other states but deferred to the legislature to make any changes in New York law.[31]

More recent decisions[32] indicate that the New York Courts are still reluctant to sustain a cause of action for retaliatory discharge absent new legislation to protect those who report violations which are not covered under Labor Law @740 but which violate public policy, or as in Mr. Wieder's case - a Code of Professional Responsibility.[33] In all cases the court declined to extend the protection of the Whistleblower Statute absent legislative action.

However, the Legislature has also been reluctant to extend protection of the Whistleblower Statute. In 1981, prior to the enactment of the current statute, "the Legislature rejected a bill which would have protected

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[31] Id. at 89

[32] See FN 24, 25, 26 ie Remba 76 NY2d 80, Connolly 161 AD 520 Lamagna 158 AD2d 558

[33] See, O'Donnell v. NPS Corp., 133 AD2d 73, 518 NYS2d 418 (2nd Dept. 1987) [plaintiff allegedly fired for refusing to participate in plan to divert assets from bankrupt company], Pavolini v. Bard Air Corp., 88 AD2d 714, 451 NYS2d 288 (3rd Dept. 1982) [plaintiff allegedly discharged for reporting safety violations to Federal Aviation Administration], Edwards v. Citibank, 74 AD2d 553, 425 NYS2d 327 (1st Dept. 1980) [plaintiff allegedly discharged for disclosing improper banking practices] and Leibowitz v. Bank of Leumi Trust Co. Inc. of New York, 152 AD2d 169, 548 NYS2d 513 (App. Div. 2nd Dept. 1989)[plaintiff allegedly discharged for wanting to disclose fraudulent activities by her supervisors to the detriment of the bank]

employees from retaliatory discharge for taking actions which benefit society in general. (1981 NY A 2566)".[34] Other bills have also been introduced to broaden the statutory standard to one of reasonable cause, and the Legislature has refused to accept any changes.[35] The refusal of the courts and the legislature to modify the existing statute provides the wrongdoer with greater protection than the individual who reports the wrongdoing. Yet, New York remains one of the few states that as a rule, still decides in favor of employers.

As previously noted, the Supreme Court and many jurisdictions now recognize three exceptions to the at-will doctrine which afford employees some protection against retaliatory discharge. The first exception is "public policy" rights, which protects employees from being fired for refusing to commit illegal acts or for exercising rights set out by law - such as filing a worker compensation claim or refusing to take a polygraph test,"[36] by imposing tort liability on employers. At least 43 states have adopted some

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[34] Remba, 149 AD2d 131, at 135

[35] Id., See 1983 NYS 1153; 1987 NYS 1995, A 6485; See also, Kern v. DePaul Mental Health Servs., 139 Misc.2d 970, 529 NYS2d 265, (Sup. Ct. Monroe County)(1988)

[36] Getting Fired and Firing Back; But NY Remains Tough Turf for Employees' Suits, Newsday, June 18, 1989, p. 74

form of the public policy exception,[37] which includes states that have enacted Whistleblower laws.[38] However, there is a problem with the definition of the term "public policy" which was articulated by the court in Maryland Casualty Co. v. Fidelity and Casualty Co., "The questions of what is public policy in a given case is as broad as the question of what is fraud".[39] This statement is reflected by the decisions in the following cases.

The first recognition of the public policy exception was by the court in Petermann v. Teamsters Local 396.[40] This court recognized an action for wrongful discharge brought by the plaintiff who had been terminated for refusing to perjure himself before a legislative committee at his employer's insistence. The court stated that a state statute forbid perjury and to allow an employer to threaten an employee with termination for failing to lie would violate public policy.[41]

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[37] see Chagares, Utilization of the Disclaimer as Effective Means to Define the Employment Relationship, 17 Hofstra L. Rev. 365, 370 (1989). See also Appendix "B"

[38] California, Connecticut, Iowa, Kansas, Maine, Michigan, Minnesota, New Jersey, New York, Rhode Island, Utah, Washington and Wisconsin, have enacted such statutes. (see 103 Harv. L. Rev. 510, 514 at FN19) and Appendix "A"

[39] 71 Cal. App. 492, 497, 236 P. 210, 212 (1925)

[40] 174 Cal. App.2d 184, 344 P.2d 25 (1959)

[41] Id. at 188

Although this exception would appear to provide employees with broad protection, later decisions reflected a narrow interpretation as to what public policy really is. In reality, the courts perform a balancing test, weighing the importance of the public policy against the burden on employment and labor as a whole. For example, in Pierce v. Ortho Pharmaceutical,[42] the court dismissed plaintiff's cause of action under the public policy exception because they concluded that plaintiff's objection to perform particular research (which led to her termination) was based on personal moral grounds, which was not a public policy violation.[43]

At other times when the court does not want to recognize the public policy exception, the court will defer to another statute, if possible, to "pre-empt a cause of action to this exception".[44] For example, in Ficalora v. Lockheed,[45] the court held that the California Fair Employment and Housing Act preempted a cause of action for wrongful discharge when an employee allegedly was fired for complaining to the Department of Labor about the employer's sex discrimination. In Makovi

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[42] 84 NJ 58, 417 A2d 505 (1980)

[43] Id. at 72

[44] Partee, 44 Van. L. Rev. at 694

[45] 193 Cal. App.3d 489, 238 Cal. Rptr. 360 (1989)

v. Sherwin Williams,[46] the court refused to recognize a common law cause of action for wrongful discharge when Title VII provided a remedy.

It has become increasingly more difficult to prove a public policy exception. The courts have haphazardly (but not uniformly), started to require a plaintiff to show the following to successfully sustain a cause of action: "(1) a direct link or nexus of the employee's position and the public policy effected; (2) the potential for the employer's use of coercion through this direct link to negative the policy; and (3) the relative importance of the policy so effected".[47] Therefore, "the establishment of a public policy exceptions to the termination-at-will doctrine represents a private concern becoming a public concern".[48] But when that public concern is so great, one court has held that the plaintiff's duty to report violations was analogous to the duty to serve on a jury or to avoid defamation. "A discharge of an at-will employee for reporting a violation of the state's policy to the proper

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[46] 316 Md. 603, 561 A2d 179 (1989)

[47] Note: Protecting the Private Sector at Will Employee who "Blows the Whistle": A Cause of Action based upon Determinates of Public Policy, 1977 Wisc. L. Rev. 777, 803 (1977)

[48] Id. at 798

authority would be a discharge for fulfilling a societal obligation and would be actionable."[49]

A small number of states, New York included, have refused to recognize the public policy exception unless stated explicitly in a statute, such as the Whistleblower Law. These states defer to the legislature as they feel that the legislature is better qualified to access the public's reaction to the proposed changes.[50] In Wieder, the New York Court refused to apply the public policy exception for just this reason.

The second exception to the at-will doctrine is implied contract rights. Using contract theory as a basis, the courts have found that terms of an employee handbook, policy manual, memorandum or oral agreements made by an employer can be interpreted as implying a contract for permanent employment, terminable only for good cause. While the traditional principles of a contract law required mutual obligation and consideration in order for a contract to be binding, modern contract law has recognized that contracts can be implied by circumstances, words or conduct.

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[49] Boyle v. Vista Eyewear, Inc., 700 SW2d 859, 874 (1985) citing, McQuary v. Bel Air Convalescent Home, Inc., 69 Or.App. 107,110, 684 P.2d 21,23 (1984)

[50] See Evans v. Bibb Co., 178 Ga.App. 139, 342 S.E.2d 484 (1986); Hartley v. Ocean Reef Club, 476 So.2d 1327, (1985)

Forty-one states have recognized this theory.[51] In Touissaint v. Blue Cross and Blue Shield of Michigan,[52], the Michigan Supreme Court found that the oral statement made to plaintiff prior to hiring him - that he would not be terminated "as long as he did his job"[53] was binding when plaintiff was hired and formed an implied contract.

In New Mexico, the Supreme Court found that language in an employee handbook modified the at-will status of an employment agreement.[54] Although plaintiff was originally hired under an at-will agreement, a company handbook was later distributed which modified the agreement. Since the employees were required to sign for the handbook and the handbook itself contained no disclaimers about its language or intent, the court decided it was a binding contract.[55]

Although a majority of states have found that the terms of an employee handbook may create binding obligations for the employer, not all states recognize this exception. Missouri has found that "an employee handbook was a self imposed

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[51] Chagares, 17 Hofstra L. Rev. 365, 405

[52] 408 Mich 579, 292 NW2d 880 (1980)

[53] Id. at 583

[54] Massingale, At-Will Employment: Going, Going ...., 24 U. Rich. L. Rev. 187, 196 (1990), citing Lukoski v. Sandia Indian Management Co., 106 NM 664, 748 P.2d 507 (1988)

[55] Id. at 186

statement of policy and not a contract with employees".[56] In New York, the courts have only recognized implied contract rights in one limited situation, as previously discussed in the Weiner case. In 1987, the court reiterated the Weiner criteria in Diskin v. Consolidated Edison Co. of NY, Inc.,[57] but decided against plaintiff in the case because once again the standard was not met.

The growing recognition of this exception will force employers to be cautious about their use of words in oral agreements and very protective of themselves in written documents by inserting clear, direct statements, (known as disclaimers), of their intention to maintain an at-will employment agreement, so as to avoid post-employment conflicts leading to lawsuits.

The third exception to the at-will doctrine is "implied covenants of good faith and fair dealing", the broadest form of protection, which require employers to deal fairly with

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[56] Id. at 197, quoting Johnson v. McDonnell Douglas Corp., 745 SW2d 661 (1988)(en banc)

[57] 522 NYS2d 888, 135 AD2d 775 (1987) (action to recover damages for breach of employment contract may be maintained, notwithstanding indefinite term of employment, where existence of limitation by express agreement is demonstrated by such circumstances as employee was induced to leave prior employment by assurance that new employer would not discharge him to leave without cause, assurance is incorporated into employment application, and provides that dismissal will be for just and sufficient cause only)

employees and only fire for "just cause".[58] Like implied contract rights, this exception is also based on contract theory. The states that recognize this exception base the requirement of good faith on the common law concept of "an implied covenant of good faith and fair dealing in every contract".[59]

Only nine states recognize this exception; Alabama, Alaska, Arizona, California, Connecticut, Massachusetts, Montana, Nevada and New Hampshire.[60] For example, in Cleary v. American Airlines,[61] the California Courts of Appeals ruled in favor of the plaintiff, an employee of eighteen years who claimed he was fired because of his union activities. "The court based its finding of a covenant" of good faith and fair dealing" primarily on two factors, long term employment and the existence of an internal grievance procedure".[62]

In Massachusetts, an employee of twenty-five years was terminated after closing a five million dollar sales order so

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[58] Getting Fired & Firing Back; But NY Remains Tough Turf for Employees' Suits, Newsday, June 18, 1989, p.74

[59] Massingale, 24 U. Rich. L. Rev. at 198, citing 1 Williston, A Treatise on the Law of Contracts, s 670 (3d ed. 1957).

[60] Chagares, 17 Hofstra L. Rev. 365, 405

[61] 111 Cal. App.3d 443, 168 Cal. Rptr. 722 (1980)

[62] Massingale, 24 U. Rich. L. Rev. at 199, citing Cleary at 455

that the company would not have to pay him commission on the sale.[63] It was obvious to the court which held for the plaintiff that good faith was lacking in the company's decision to terminate.

A New Hampshire case, Monge v. Beeke Rubber Co.,[64] was also decided on this basis. In this case the employee was harassed and terminated for refusing to date her foreman. However, today it is likely that this case would be decided using Title VII of the Civil Rights Act of 1991.

Montana has also recognized an implied covenant,[65] noting that good faith is not subject to a contractual waiver, either express or implied. Therefore, an employer cannot disclaim good faith and fair dealing, even in an at-will employment agreement. In 1987, the state legislature enacted a statute, (the first state to do so), which allows actions for dismissals that "are not for good cause".[66] "Other

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[63] Fortune v. Nat'l Cash Register Co., 373 Mass. 96, 364 NE2d 1251 (1977)

[64] 114 NH 130, 316 A.2d 549 (1974)

[65] Gates v. Life of Montana Ins. Co., 196 Mont. 178, 638 P.2d 1063 (1982)

[66] 103 Harv. L. Rev 510, at 514 (see FN20 -"See Mont. Code Ann. ss 39-2-901 to -914 (1987). Good cause is defined as reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operations, or other legitimate business reason.)

states, including...New York... have considered but not yet enacted similar proposals".[67]

Although almost all states recognize some form of an exception to the at-will rule,[68] there is no uniformity between the states. A committee has been formed to draft a national standard and procedures for resolving claims, as well as remedies.[69] But, to date, such a uniform act has not been enacted into law.

An interesting distinction has arisen when the Whistleblower is an attorney and in-house counsel for a company. In Minnesota, the Court of Appeals refused to recognize an action brought by in-house counsel for wrongful discharge against the corporation because of the nature of the relationship between the attorney and the corporation.[70] In Herbster v. N. American Co. for Life and Health Ins.,[71] the

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[67] Id.

[68] Delaware is the only exception. It is unresolved as to the public policy and "good faith and fair dealing" exceptions and decided against acceptance of the implied contract theory in Heideck v. Kent Gen. Hosp., 446 A.2d 1095 (1982). See, Chagares, 17 Hofstra L. Rev. at 401

[69] See, National Conference of Commissioners on Uniform State Laws, Draft Uniform-Termination Act, 540 Individual Employee Rts. Man. 21, 23 (1990)

[70] Nordling v. Northern States Power Co., 465 NW2d 81 (1991)

[71] 150 Ill App3d 21, 501 NE2d 343 (1986)

Illinois Appellate Court also held that plaintiff, an employee and chief counsel was barred from claiming retaliatory discharge due to an attorney-client relationship. Recently, the Supreme Court of Illinois agreed with that decision in Balla v. Gambro Inc.[72] The lower court in that case held that an attorney is not barred from bringing a retaliatory discharge action, but based its decision on the nature of the relationship between employer and employee - that of an attorney and client, which the Supreme Court affirmed. In all three cases, the courts chose to base their decisions on the relationship between the parties, rather than recognize that an attorney also has rights an employee.

As previously discussed, Illinois recognizes the public policy exception to employment-at-will.[73] The court in Palmateer, stated "the foundation of the tort of retaliatory discharge lies in the protection of public policy".[74] So long as public policy is affected, the courts will acknowledge the cause of action. But if the individual affected is an attorney the courts will only recognize a cause of action if

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[72] No. 70942, slip opinion, (Sup. Ct. Ill. December 19, 1991)

[73] see Palmateer v. International Harvester Co., 85 Ill.2d 124, 421 NE2d 876 (1981)

[74] Id., at 133

the employer-employee relationship is not one of attorney-client.

The conflict in the Balla[75] decision is that although plaintiff's disclosure was required by the Illinois Rules of Professional Conduct, "extending the tort of retaliatory discharge to in-house counsel would have an undesirable effect on the attorney-client relationship that exists between employers and their in-house counsel".[76] Therefore, to maintain open and frank communication between an employer and his in-house counsel, the court will not allow an attorney to retaliate for his dismissal after being required to "blow the whistle" by the Rules of Professional Conduct.

A recent decision by the Court of Appeals in Michigan appears to be look at the situation differently. In Mourad v. Automobile Club Ins. Asso.,[77] the court held that an attorney wrongfully discharged by an insurance company could maintain an action because his dismissal was the result of his refusal to participate in conduct which would have violated the Code of Professional Responsibility. This decision gives credibility to the argument that violating the Code of Professional Responsiblity is analogous to violating a law or

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[75] see FN72

[76] ____ at ____

[77] 465 NW2d 395, 186 Mich App 715 (1991)

statute, which would then fall within the public policy exception.

Although this Michigan decision gives some hope for future headway in this area of law, given the lack of progress in enacting new legislation in New York, a uniform act would be a preferable solution to Mr. Wieder's action as well as those similarly situated, like the plaintiff in the Balla case.[78] With the present New York Whistleblower Law being so restrictive, common sense would appear to prescribe a different perspective as to its interpretation, as the Michigan court decided.

It would ~~seem~~ appear that Mr. Lubin's failure to properly represent Mr. Wieder does pose "a substantial and specific danger to the public's health and safety"[79] although not in a ~~physical sense~~. But the consequences of an attorney's misconduct can be just as great as An individual who hires an attorney, places his trust in that person. He expects that the attorney will properly represent his best interests and

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[78] See Easterson v. Long Island Jewish Medical Center, 549 NYS2d 135, 156 AD2d 636 (1989) [Medical center's discharge of employee for failing to comply with supervisor's request for medical records from file of another employee did not fall within the Whistleblower Statute; even if disclosure of records would violate statute proscribing "professional misconduct", with result that employee might lose her professional license, as medical center's action did not threaten health or safety of public at large.

[79] NY Lab. Law @ 740, McKinney's (1991)

relies on that attorney's expertise. The fact that Mr. Wieder is also an attorney does not diminish his belief in Mr. Lubin's capabilities. Therefore, his reporting of such conduct should be encompassed by the Whistleblower Law as Mr. Lubin's behavior does pose a significant danger to the public's well-being. Unlike the attorney in Balla[80] who was confronted with an attorney-client confidence which prevented him from being able to recover against his employer for his retaliatory discharge, there was no breach of a any confidence between Mr. Wieder and the defendant law firm. He was not the firm's attorney, he was a client of the firm, and should be recognized as such. If his action were brought in Illinois after the Balla[81] decision, it is likely the courts would recognize it. By allowing Mr. Lubin to continue to practice law unreprimanded for past violations, allows him to perpetuate this harmful conduct. Terminating Mr. Wieder for reporting such conduct only alleviates the immediate situation without getting to the source of the harm. It is hard to distinguish the difference between reporting a situation which violates the law and creates a danger to the public, and reporting legal misconduct - both can cause serious harm, and

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[80] See FN72

[81] See FN72

yet, New York law still chooses to recognize only one category of harm.

Therefore, it appears that it is time for either the New York legislature or the courts to realize the effect of their failure to act and broaden their outlook so the law is applicable to a variety of situations.

Since the neither the state's labor laws, courts nor legislature support Mr. Wieder's claim, a review of the Code of Professional Responsibility may give some strength to his argument that his was wrongfully discharged. In New York, DR 1-103(A)[82] of the Lawyer's Code of Professional Responsibility requires an attorney with knowledge not protected by confidence or secret, of an another attorney's

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[82] 1991 Selected Standards on Professional Responsibility, Morgan & Rotunda, Foundation Press, 1991 [hereinafter Selected Standards] See also, The Lawyer's Code of Professional Responsibility, New York State Bar Association (as Amended September 1, 1990)
DR 1-103(A) - Disclosure of Information to Authorities
"A lawyer possessing knowledge, not protected as a confidence or secret, of a violation of DR 1-102 that raises a substantial question as to another lawyer's honesty, trustworthiness or fitness in other respects as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."

violation of DR 1-102(A)[83] to report such violation to the proper authority.

This rule as amended in 1990, requiring an attorney possessing "knowledge" rather than "unpriviledged knowledge" as was previously written, imposes a mandatory reporting requirement, by refining "the standard of knowledge required to trigger the obligation to report misconduct of another lawyer and narrows the class of misconduct that must be reported".[84] Failure to report such misconduct may result in suspension or disbarment, as was the outcome of a recent Illinois decision.

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[83] Selected Standards, see FN 82
See also The Lawyer's Code of Professional Responsibility, New York State Bar Association, (as Amended September 1, 1990)
DR 1-102(A) - Misconduct
"A lawyer shall not:
1. Violate a Disciplinary Rule.
2. Circumvent a Disciplinary Rule through actions of another.
3. Engage in illegal conduct involving moral turpitude.
4. Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.
5. Engage in conduct that is prejudicial to the administration of justice.
6. Unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment, on the basis of race, creed, color, national origin, sex, disability, or marital status.
7. Engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

[84] New York City Bar Association Ethics Opinion; Opinion No. 1990-3, New York Law Journal, May 16, 1990, at pg 7

In In re James H. Himmel,[85] an attorney who failed to report misconduct on the part of an attorney who had formerly represented a client and had converted a client's settlement, had his licensed suspended for violating the duty to report the other attorney's misconduct. Although the attorney defended himself by stating that the client, after retaining him to represent her, had directed him not to report the prior attorney's misconduct, the court held that this was not a legitimate defense to a violation of DR 1-103(A)[86] of the Code of Professional Responsibility which mandates the imposition of discipline for a breach of duty.[87] In determining the extent of the discipline to be imposed, the court considered the underlying purpose of the Code which is to "maintain integrity of legal profession, to protect administration of justice from reproach, and to safeguard the public".[88]

While the decision of the Illinois Court is not binding on the New York Courts, it is indicative of the judiciary's view as to the seriousness of enforcing the Professional Code. The New York Courts have also shown little leniency when an

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[85] 125 Il12d 531, 533 NE2d 790 (1989)

[86] Selected Standards, See FN82

[87] See also Weber v. Cueto, 209 Ill. App.3d 936, 568 N.E.2d 513 (1991)

[88] Id.

attorney violates the Code. In In re Lefkowitz,[89] the Appellate Division disbarred the respondent even though the Disciplinary Committee had only recommended a five year suspension. Respondent was a partner in a law firm who at the request of senior partners made illegal gratuitous payments to a law assistant at the Supreme Court, New York County on several occasions to "secure favorable and/or expeditious disposition of pending motions".[90] The court held that respondent should be disbarred because he not only knew the payments were illegal, but he was also under an affirmative duty to report the requests of his senior partners to the appropriate Disciplinary Committee. Similar to the Illinois Court they stated that their duty was "to protect the public".[91] The apparent harshness of this decision was based on many factors, including the length of time the attorney had been practicing, the repeated payments, the fact that the attorney himself was once extorted by the Clerk and the court's view that such a decision was needed to maintain integrity within the profession.

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[89] 105 AD2d 161, 483 NYS2d 281 (1984)

[90] Id., at 161

[91] Id., at 162

Similarly, in In re: Dowd and Pennisi,[92] in New York the Supreme Court, Appellate Division, held that paying kickbacks to a city official who is also an attorney and failing to report the illegal payments is a violation of DR 1-103(A).[93] In suspending the two attorneys' legal licenses for five years the Court took into consideration the fact that there were mitigating factors such as the attorneys' clean professional records and the fact that there were threats by the city official of retaliation if they didn't pay, which resulted in more lenient disciplinary decision.

It should be noted there are attorneys on occasion who do report violations of misconduct, with the result that the offending attorney is occasionally disbarred.[94] Because the punishment is so severe, an accusing attorney wants to be certain of what he is reporting. But problems arise as to what degree of certainty is required to constitute "knowledge". In New York, the Second Circuit has held that a lawyer must only disclose information he "reasonably knows to be a fact" and "which clearly establishes" the existence of

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[92] 160 AD2d 78, 559 NYS2d 365 (1990)

[93] Selected Standards, See FN82

[94] See The Committee on Professional Ethics and Conduct of the Iowa State Bar Asso. v. Baker, 269 N.W.2d 463 (1978), (attorney disbarred after fellow attorney reported ethical violation arising from his purchase and resale of a farm from an estate being probated by his firm)

fraud".[95] EC 1-4 of the Lawyers Code of Professional Responsibility requires an attorney to voluntarily reveal all unpriviledged knowledge which he believes is a violation of the Disciplinary Rules.[96] Such a high level of certainty is required because of the serious consequences arising from a reported violation.

But what is left by decisions like Dowd and Lefkowitz is anything but certainty. These cases reinforce the affirmative duty of the Code of Professional Responsibility but fail to give practical guidelines as how to deal with future situations when they arise. When it is an obvious such as in these two cases, application of the appropriate rule is easy. But what are the guidelines in cases that aren't so clear?

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[95] NYLJ, May 16, 1990, at pg 7, citing Doe v. Federal Grievance Committee, 847 F2d 57 (2d Cir. 1988)

[96] Selected Standards, See FN82
See also The Lawyer's Code of Professional Responsibility, New York Bar Association, (As Amended September 1, 1990)
EC 1-4
The integrity of the profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials. A lawyer should reveal voluntarily to those officials all knowledge, other than knowledge protected as a confidence or secret, of conduct of another lawyer which the lawyer believes clearly to be a violation of the Disciplinary Rules that raises a substantial question as to the other lawyer's honesty, trustworthiness or fitness in other respects as a lawyer. A lawyer should upon request, serve on and assist committees and boards having responsibility for the administration of the Disciplinary Rules.

"Lawyers are not under a duty to report every suspicion they may have of possible ethical violations by other lawyers."[97] Such a requirement would be ludicrous and result in a system overburdened by suspicion and potentially false accusations reported to protect an attorney from disciplinary action under DR 1-103(A)[98]. While the Model Code as interpreted by the Second Circuit in New York appears to apply a "probable cause" test to the attorney's knowledge of misconduct, the ABA Model Rules of Professional Conduct differ from the Professional Code by applying what appears to be a less rigid standard. These differences are: "(1) a lawyer would not be required to report his own violations; (2) the reporting requirement applies only to violations which raise substantial questions of a lawyer's honesty, trustworthiness or fitness as a lawyer; and (3) the lawyer is required merely to inform authorities rather than report."[99]

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[97] Mitchem, The Lawyer's Duty to Report Ethical Violations Colorado Lawyer, October 1989

[98] Selected Standards, See FN82

[99] Mitchem, Colorado Lawyer, October 1989, See FN97
See also, Selected Standards, ABA Model Rules
Rule 8.3 - Reporting Professional Misconduct
(a) A lawyer having knowledge that another lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

It is not relevant to discuss the requirement of self-reporting as it does not pertain to the issues here. While the Model Rules do not clarify what violations rise to the level of "substantial" so as to require reporting, it is significant to note that the Rule implies that not all violations require reporting. And finally, the Rules leave open the method of informing authorities, rather than requiring a formal report, although "a formal report of a grievance may better assure appropriate investigation and processing of information than merely informing".[100] Unfortunately, while the Model Rules are not as rigid, they too leave areas of the rule open to interpretation.

The Model Code refers to "unprivileged knowledge" of a violation and the Model Rules refers to "conduct that raises a substantial question" as to whether a violation has been committed, yet neither provides criteria for "a corresponding duty to investigate information which suggests the possibility of, but does not establish knowledge of, an ethical

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(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.
(c) This rule does not require disclosure of information otherwise protected by Rule 1.6

[100] Id.

violation".[101] To impose a duty to report without imposing a duty to investigate seems to contradict DR 6-101,[102] which requires an attorney to act competently in the preparation and handling of a legal matter. In handling any other matter, an attorney would thoroughly investigate any facts which he was not sure of. Yet neither the Rules nor the Code impose such a requirement leaving open to an attorney's observation how accurate and reliable the information is, and then permitting him to report this information without verification or evidence.

Both the Model Code and the Model Rules are intended as a self-regulatory devices for the legal profession. An apparently isolated incident which violates the law, i.e. - a parking violation, should obviously not be considered substantial enough to warrant burdening the Grievance Committee with a complaint. Nor should it burden an attorney with a duty to report such a violation. Therefore, unless an attorney has personal knowledge of a violation that reaches a

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[101] Mitchem, Colorado Lawyer, October 1989

[102] Selected Standards, See FN82
DR 6-101 - Failing to Act Competently
(A) A lawyer shall not:
(1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.
(2) Handle a legal matter without preparation adequate in the circumstances.
(3) Neglect a legal matter entrusted to him.

level which in his own opinion is so flagrant a violation as to require him to report the misconduct, it is likely that an attorney will not report the violation. It is a judgment call on the part of the attorney and it likely that most attorneys would rather be cautious and let a violation pass, than wrongly accuse a fellow lawyer.

Applying the Model Code to the facts of Mr. Wieder's case, it would appear that they clearly support his position that Mr. Lubin should have been promptly reported to the Departmental Disciplinary Committee. DR 1-103(A)[103] required him to report conduct which violates any provision of DR 1-102(A),[104] of which he reasonably knows to be a fact. There was no doubt that as Mr. Lubin's client, no one had a better knowledge of the facts than Mr. Wieder. Although the Code would prohibit an attorney from reporting misconduct if the knowledge were confidential due to an attorney-client privilege, since Mr. Wieder chose to breach the attorney-client privilege by divulging the situation, the information was not "protected by a confidence or secret".[105] Mr.

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[103] Selected Standards, See FN82

[104] Selected Standards, See FN83

[105] Selected Standards, EC-104
See Mitchem, Colorado Lawyer, October 1989
"The comments to the Model Rules indicate that a lawyer should encourage a client to consent to disclosure where prosecution of a grievance would not substantially prejudice the client's interest. (The

Lubin's failure to properly represent Mr. Wieder in obtaining a mortgage commitment clearly violated DR 1-102(A)(4) - "A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation".[106] His subsequent action of signing firm checks without authorization further violated Disciplinary Rules.

However, Mr. Wieder should not be held accountable for violating his duty to report since he followed proper procedure for reporting the misconduct to defendant law firm and they interfered with him proceeding further. In fact, defendant law firm should be disciplined for failing to promptly take action and for violating DR 1-104[107] as they

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Code of Professional Responsibility is silent as to whether the client should be encouraged to waive the attorney-client privilege.)"

[106] Selected standards, See FN83

[107] The Lawyer's Code of Professional Responsibility, New York State Bar Association, 1990
DR 1-104 Responsibilities of a Supervisory Lawyer
A. A lawyer shall be responsible for a violation of the Disciplinary Rules by another lawyer or for conduct of a non-lawyer employed or retained by or associated with the lawyer that would be in violation of the Disciplinary Rules if engaged in by a lawyer if:
(1) The lawyer orders the conduct; or
(2) The lawyer has supervisory authority over the other lawyer or the non-lawyer, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

were responsible for seeing that all employees of the firm complied with the Disciplinary Rules. As an associate, Mr. Lubin "owes certain duties to the law firm that are implied in law by virtue of the relationship of the associate to the law firm",[108] and as a regular employee of that law firm was subject to the partner's control. The law of agency defines an associate as a paid agent of the firm,[109] and as such he has a duty to the firm to perform competently. By this definition and these reciprocal duties, a law firm is accountable to its clients irregardless of the Model Code and the courts have held them responsible for the incompetence of their associates.[110] On the other hand, an associate who is directed to perform an unethical act which violates the Model

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[108] Gross, Ethical Problems of Law Firm Associates, 26 Wm & Mary L. Rev 259, at 261 (1984-5)

[109] Id., at 261, See FN 19. "The Restatement (Second) of Agency provides: Unless otherwise agreed, a paid agent is subject to a duty to the principal to act with standard care and with the skill which is standard in the locality for the kind of work which he is employed to perform and, in addition, to exercise any special skill that he has. Restatement (Second) of Agency s 379(1) (1958)

[110] Id., at 263, See FN21. See "In re Neimark, 13 AD2d 676, 214 NYS 2d 12 (1961), In re Schelly, 94 Ill.2d 234, 446 NE2d 236 (1983). Both cases involved incidents where an attorney was disciplined for employing an incompetent to disbarred attorney. Therefore, the law firm's liability arises not merely from its having employed an associate who was negligent, but also from its own negligence".

Code is expected to disregard the instruction.[111] This presumption places adherence to the Model Code ahead of an attorney's duties to his employer. If that is true, then following the Model Code by reporting a violation to one's employer, as Mr. Wieder did, should not result in terminating the attorney. Obviously, defendant law firm placed Mr. Wieder's duty to the law firm ahead of adherence to the Model Code, which requires either the courts or a the Disciplinary Committee to address.

What is also unconscionable is the law firm's offer to compensate Mr. Wieder economically for Mr. Lubin's failure to properly represent him and by requesting him to overlook the matter. While it is true that the firm did eventually report this wrongdoing after Mr. Lubin left the firm, such a delay is not viewed favorably by the courts. "In determining whether there is room for judgment as to how promptly a report must be made, a lawyer should balance the severity of the misconduct engaged in by the other lawyer and the likelihood that he or she will engage in such misconduct again in the future to the detriment of other clients against the degree of prejudice that the reporting lawyer's client will suffer from prompt reporting".[112] In the Wieder case, it is likely that Mr.

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[111] Id., at 266

[112] NYLJ, May 16, 1990, at pg. 7

Lubin had performed incompetently on other occasions which the firm may or may not have been aware of, and a delay in reporting this conduct was to the detriment of these clients, for which the firm would be liable. It also appears that by such delay, the firm did not wish to have their name nor a current employee's name involved in any disciplinary proceedings because of the negative implications involved in such proceedings and the damaging reflection on the firm's reputation. As undesirable as reporting a violation to the Grievance Committee would be, the failure to report resulted in the firm violating DR 1-103(A)[113] as well as DR 1-104.[114] The Grievance Committee should therefore not only have disciplined Mr. Lubin and the firm, but also each partner in the firm individually as well. So far, it appears that Mr. Lubin is still practicing law and the firm is still doing business unimpaired.

Unfortunately for Mr. Wieder, it is not only defendant law firm, but the legal profession in general that is reluctant to report violations of DR 1-103,[115] making its enforcement impossible. A classic example of the lack of reporting known as the "Wilkie Cover-up" was commented on in the American

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[113] Selected Standards, See FN82

[114] The Lawyers Code of Professional Responsibility, See FN107

[115] Selected Standards, See FN82

Lawyer- "In the Wilkie Cover-up, partners of a major New York law firm dismissed two associates for billing to clients of the firm hours actually spent moonlighting by the two attorneys...Such indifference to the demands of the Code makes a mockery of a profession supposedly representing to the public that it will uphold honor and justice".[116] Ironically, if Mr. Wieder had been an actual client of the firm and Mr. Lubin had failed to competently represent him, he could have filed a complaint with the Grievance Committee, although under no obligation to do so. In that case, both Mr. Lubin and the firm would have had to answer an investigative inquiry, as to the charges anyway. So because the incident was between lawyers, who supposedly want to self-regulate their profession, according to defendant law firm, the matter was supposed to be ignored by Mr. Wieder.

A third argument which Mr. Wieder cause raises is, since attorneys are officers of the court, should the courts and not the legislature regulate the terms of their employment and exempt them from dismissal for whistleblowing? Since the New York State legislature has failed to provide a solution to Mr. Wieder's problem of not having an actionable claim under the current Whistleblower Law and not recognizing his claim under

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[116] Gross, 26 Wm. & Mary L. Rev. at 302, see FN 184 citing Brill, Wilkie Farr's Cover-up, The American Lawyer, Aug. 5, 1981 at 4

the Model Code, perhaps it is time for the Courts to assume total regulation of the legal profession.

Currently the state Supreme Court has the power to admit and discipline attorneys. As the Supreme Court has stated, the states have broad power to regulate the practice of professions "as part of their power to protect the public health, safety and other valid interests."[117] This would fall within the constitutionally granted state police power and it would seem that if the courts took over the regulation of the legal profession they could accomplish what the legislature and Bar Association has failed to do. That is, enforce the Model Code while protecting attorneys from wrongful termination for complying with it and yet still fulfill the goal of protecting the public through true self-regulation.

Although a state's authority to regulate the profession within its borders is broad, it is not unlimited. "The Fourteenth Amendment of the Constitution requires that state-imposed restrictions bear a rational relationship to an individual's fitness or capacity to practice the profession".[118] Therefore, any regulations made by the state

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[117] Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975)

[118] Massaro, Constitutional Limitations on State-Imposed Continuing Competency Requirements for Licensed

must consider the due process and equal protection clauses of the Constitution, and are subject to the scrutiny of the Supreme Court. In Schware v. Board of Bar Examiners, the Supreme Court overruled the decision of the New Mexico Court which refused to allow Schware to take the state bar examination based upon "bad moral character".[119] The Court held that Schware was deprived of due process by preventing him from taking the examination based upon conduct engaged in over fifteen years prior to the examination. The Court went on to clarify the limits of state authority on regulation of the legal profession by stating:

> "A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law...Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory."[120]

Yet, "Constitutional rights of speech, publication and obligation of contract are not absolute, and in a given case where the public interest is involved, courts are entitled to

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Professionals, 25 Wm. & Mary L. Rev. 253, 267, See FN25, Winter 1983

[119] 353 U.S. 232 (1957)

[120] Id., at 239

strike a balance between fundamental constitutional freedoms and the state's interest in the welfare of its citizens".[121] So, the courts are asked to do a balancing test between public policy and citizens' welfare. This is not unlike the balancing test the court performs in granting a public policy exception to the employment-at-will doctrine.

In a situation like Mr. Wieder's, regulation of the legal profession by the courts would be advantageous. Yet it would require judicial activism which is not characteristic of the New York courts as indicated by their recent decisions. In choosing to hide behind the current Whistleblower Law, the courts may be violating Constitutional Law.

Backtracking to the requirements of due process and equal protection, the Fourteenth Amendment states that "[n]o state shall make or enforce any law which shall abridge the privileges and immunities of the United States; nor shall any State deprive any person of life, liberty or process without due process of the law; nor deny any person within its jurisdiction the equal protection of the laws".[122] In protecting defendant law firm from retaliatory tort action for wrongful dismissal, while depriving Mr. Wieder from pursuing

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[121] Palmer v. Unauthorized Practice Committee of the State Bar of Texas, 438 SW2d 374, 376 (1969)

[122] Fourteenth Amendment, Section 1. Brest, Process of Constitutional Decisionmaking, Second Edition, 1983, p. lv

his claim, they are denying Mr. Wieder equal protection of the law. The narrowness of the Whistleblower Law deprives any but a few individuals from "fighting back" when wrongly discharged for doing what they perceived to be the correct (and often moral) thing to do. Only one small, narrowly defined group is really protected by the law.

Is There a real Equal Protection issue?

The right to contract and engage in an occupation are considered to be almost fundamental rights, which fall under the category of "liberty" in the Constitution. As previously discussed, the need for a "just cause" standard as a basis for termination is needed to preserve this right. The unequal bargaining power of the employer who is aware of the helplessness of the employer to fight back when dismissed, deprives the employee of this fundamental Constitutional promise. The current law only adds to the inequality. Consequently, it is possible that the court is infringing on the Constitutional rights of an employee in refusing to expand the scope of the present Whistleblower Law.

Further, it seems unjustifiable that the Court has not recognized the injustice in holding Mr. Wieder to a lofty professional standard of upholding the Model Code while not supporting his position through judicial reinforcement of that Code by punishing the defendants. Nowhere in the Wieder decision does the court reprimand either the defendant law firm nor the individual defendant, nor indicate that some form

of punishment should be administered for their failing to comply with the Model Code. If the court is supposed to perform a balancing test in regulating the legal profession by "weighing fundamental constitutional freedoms against the state's interest in the welfare of its citizens";[123] it has not done so in this case. There is no regulation of the legal profession at all. The court overlooks this issue by preferring to rely on a narrowly interpreted statute, which should not be applicable in a situation where professional rules of ethics place an affirmative obligation on an individual to comply; and yet the court does nothing except refuse to accept plaintiff's claim as a valid cause of action. Inasmuch as state regulation of the profession has been justified as a "valid exercise of state police power and prerogative in pursuance of its objective of maintaining the legal profession on a high level",[124] the New York Courts have failed in sustaining this standard by refusing to advocate a change in the law. Whereas the New York Courts were once considered progressive in the area of lawmaking, it appears that they are now stagnant. This unyielding reliance on the current law will only be altered when an individual is

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[123] Palmer, 438 SW2d at 376

[124] In re Avery's Petition, 44 Haw. 597, 358 P.2d 709, 710-711 (1961)

able to challenge it on a Constitutional grounds and bring it into the Federal Courts and out of New York's jurisdiction.

So where does this leave Mr. Wieder? Since the case was decided against him on his claim of retaliatory discharge under the Whistleblower Law, he can pursue his action in two or three different ways.

First, he can start his claim over (assuming he is within the statute of limitations) alleging that his proposed reporting of the violations of the Model Code by the firm and Mr. Lubin resulted in his unjustified termination. Since his claim would not be premised on the Whistleblower Statute, he would have to use the public policy or the implied covenant of good faith and fair dealing exceptions to the employment-at-will doctrine.

As previously explained, Mr. Wieder lost his case the first time using this exception. However, this time he would have to argue that the public policy exception should be premised on the rules in the Model Code. In order to sustain his cause of action, he would have to show that there is a direct nexus between his dismissal for following the Code and public policy that would be affected. His strongest argument would be that upholding his wrongful discharge would result in future cover-ups by attorneys for conduct which would be damaging to society in general, as well as the reputation of

the legal profession; thereby making his private concern a public concern.[125]

Although not as widely recognized, and not recognized in New York at all, is the implied covenants of good faith and fair dealing, or just cause exception. This exception appeals to a person's common sense of decency of what is right. Again, his strongest argument would be based upon the violations of the Model Code, and the theory that it is wrong to terminate an individual who is just "doing what he is supposed to do".

With either of these exceptions to the Model Code, Mr. Wieder would have to remind the court as to the importance of these rules since the court has not chosen to uphold them here, as it has in the past.[126] It seem ironic that Mr. Wieder is being punished for following a professional code while the parties who are culpable received no disciplinary action at all. Mr. Wieder's career, reputation and finances have suffered while the offending parties walk away unscathed, if not rewarded by the court's failure to act. Perhaps without intending to the court has sanctioned their actions,

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[125] Note: Protecting the Private Sector at Will Employee who "Blows the Whistle": A Cause of Action based upon Determinates of Public Policy, 1977 Wisc. L. Rev. 777, 798 (1977)

[126] See In re Lefkowitz, 105 A.D.2d 161, 483 N.Y.S.2d 281 (1984); In re Dowd and Pennisi, 160 AD2d 78, 559 NYS2d 365 (1990)

and appears to be sending mixed messages to the profession. If he were able to convince the court that the Model Code is indeed important in a situation such as this and therefore should be enforced, then it would be incongruous to allow a firm to terminate an attorney for complying with them. Further, self-policing within the profession can only be accomplished if the rules apply to all parties equally. It is expected the civil and criminal statutes and laws apply to all citizens; and it is expected that the Model Code is applicable to all attorneys practicing within the state.

In an attempt to remove the case from New York jurisdiction, he could attempt to raise Constitutional violations of the Fourteenth Amendment to bring the case into Federal Court. The Courts of New York have violated the equal protection clause by applying different standards under the Model Code to Mr. Wieder and the defendants. By not reprimanding the defendants or indicating any form of sanction, the court has prejudiced Mr. Wieder because he took a professional oath to uphold the Model Code only to have the court enforce it haphazardly. Even if he were not an attorney, he would be prejudiced by the favoritism shown to the defendants, and therefore the state has ignored the welfare of its citizens as a whole, and failed its objective of maintaining a high level of integrity within the profession. It is within the state's police power to enforce

any laws which any of its citizens are bound by. Therefore, if the state courts will not enforce them, the Supreme Court has the authority to intervene.

Whatever the results are of this case, it leaves some important and disturbing questions unanswered for those in the legal profession. Based upon case law in New York today, it appears that unless you have absolute personal knowledge about a violation committed by another attorney, you should say nothing. If you work for a firm and feel that your job may be tenuous if you report a violation, you should say nothing. Even if you feel your job is secure, it may be best to test the waters before saying anything. If you work for yourself, it can still be hazardous to your reputation to be known within the profession as an informer, especially of your peers. Although it is commendable to report a violation in compliance with the Code, it is risky to do so when neither case law, the legislature, nor the courts will advocate your position should you be terminated for complying with the Code. It appears that nobody likes a tattletale, even when an ethical duty requires you to be one.

APPENDIX "A"

CONNECTICUT: Conn. Gen. Stat. Ann. Sec. 31-51m(b) (West Supp. 1988), as amended by Conn. Public Act 87-14 (1987)
(prohibits retaliation by private employers and subdivisions of the state [but excluding the state] against employee who reports violation or suspected violation of law or who participates in a public process pertaining to such report; permits employee to bring civil action for reinstatement and back pay after exhaustion of available administrative remedies);
Conn. Gen. Stat. Ann. Sec. 4-61dd(b)(West Supp. 1987), as amended by Conn. Public Act 85-559 (1985)(prohibits retaliation against state employee who discloses to attorney general information regarding corruption, unethical practices, illegal acts, mismanagement, gross waste of funds, abuse of authority, or danger to public safety occurring in any state department or agency)

HAWAII: Haw. Ann. Stat. HRS @ 378-62 (1991)
(protects an employee from discharge, threats or other discrimination by employer for reporting verbally or in writing a violation or suspected violation of law or rule of the state or subdivision of state, or United States, unless the employee knows it to be false; unlawful to discharge, threaten or otherwise discriminate against employee requested to participate in an investigation, hearing or inquiry held by a public body or court action.)

KANSAS: Kan. Gen. Stat. Sec. 75-2973 (Supp. 1987)
(protects right of state employees to discuss operation of their employing agencies with members of state legislature; unlawful for any state supervisor to prohibit state employees from reporting violations of state or federal laws, rules or regulations to any person, agency or organization).

ILLINOIS: Ill. Ann. Stat. ch. 127, Sec. 19c1 (1983), as amended by Public Act 85-470 (1987) (prohibits disciplinary action against a public employee who discloses, upon reasonable belief, a violation of any law, rule or regulation or mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety, provided the disclosure is not specifically prohibited by law; identity of the employee may not be disclosed without his consent during the investigation of the process of related matters.

MICHIGAN: Whistleblowers' Protection Act, Mich. Comp. Laws Ann. Sec. 15.362 (West 1981), as amended by Public Act 146 (1982) (prohibits retaliatory discharge of employee for reporting, orally or in writing, a violation or suspected violation of law, regulation, or rule of state or political subdivision thereof or U.S., or because employee is requested by public body to participate in investigation, hearing, inquiry or court action.

NEW HAMPSHIRE: N.H. Ann. Stat. Ch. 275-E (1990) (private employer prohibited from discharging, threatening, or otherwise discriminating against any employee who in good faith reports or causes to be reported, verbally or in writing, what employee has reasonable cause to believe is a violation of any law or rule adopted under the laws of the state, a political subdivision or the United States; or who in good faith participates in an investigation, hearing or inquiry concerning allegations that the employer has violated any law or rule; employee must have first brought the alleged violation to the person having supervisory authority with the employer and allowed reasonable opportunity to correct the violation, unless employee had specific reason to believe that reporting such violation would not result in promptly remedying the violation)

NEW YORK: N.Y. Lab. Law Sec. 740 (McKinney 1991) (private employers prohibited from retaliating against employee who [1] discloses, or threatens to disclose, to supervisors or to a public body an activity, policy or practice of employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to public health or safety, [2] provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any such violation of law, rule or regulation by such employer, [3] objects to, or refuses to participate in any such activity, policy or practice in violation of law, rule or regulation) (suit cannot be maintained unless employee first informed supervisor of illegal activity and gave employer reasonable time to correct; exclusive remedies are reinstatement and backpay)

OREGON: ORC. Ann. Stat. @ 4113.52 (1991) (prohibits retaliatory action against employee who becomes aware and reports a violation of state or federal statute, regulation or ordinance which his employer has authority to correct, which is likely to cause imminent risk of physical harm to persons or a hazard to public health or safety; employee shall orally notify supervisor and provide that supervisor with detailed written report of such violation; employer has twenty-four hours to make a reasonable and good faith effort to correct violation or employee may report violation to proper public authority)

RHODE ISLAND: Whistleblowing Protection Act. R.I. Pub. Laws Ch. 137, Gen. Laws Secs. 36-15-2 through 36-15-9 (1984) (prohibits an employer who disposes of toxic waste from retaliating against employee who reports violation of law, rule or regulation)

WASHINGTON: Rev. Code Ann. Sec. 42.40.050 (West Supp. 1983) (provides that public employee who is subjected to reprisal or retaliatory action undertaken during two year period after he/she makes a good faith report of improper governmental actions to state auditor may seek judicial review of the reprisal or retaliatory action, whether or not there has been an administrative review of the reprisal or retaliatory action; court may award reasonable attorney's fees; "reprisal or retaliatory action" includes, e.g. denial of adequate staff to perform duties, frequent staff changes, frequent and undesirable office changes, refusal to assign meaningful work and unwarranted and unsubstantiated discipline)

WISCONSIN: Wisc. Stat. Secs.230.80 and 895.65 (1983-4) (private and public employers prohibited from disciplining employees in reprisal for disclosure of information to appropriate law enforcement agencies of any violations of laws, rules or regulations, mismanagement, gross abuse of funds, abuse of authority, or danger to public health or safety).

APPENDIX "B"

(See Attached)

APPENDIX

STATE RECOGNITION OF LIMITATIONS TO THE EMPLOYMENT AT WILL RULE*

STATE	IMPLIED CONTRACT	PUBLIC POLICY EXCEPTION	GOOD FAITH & FAIR DEALING
ALABAMA	YES	NO	YES
	Hoffman-La Roche, Inc. v. Campbell, 512 So. 2d 725 (Ala. 1987)	Williams v. Killough, 474 So. 2d 680 (Ala. 1985)	Hoffman-La Roche, Inc. v. Campbell, 512 So. 2d 725 (Ala. 1987)
ALASKA	YES	YES	YES
	Eales v. Tanana Valley Medical-Surgical Group, Inc., 663 P.2d 958 (Alaska 1983)	Knight v. American Guard & Alert, Inc., 714 P.2d 788 (Alaska 1986)	Mitford v. de Lasala, 666 P.2d 1000 (Alaska 1983)
ARIZONA	YES	YES	YES
	Leikvold v. Valley View Community Hosp., 141 Ariz. 544, 688 P.2d 170 (1984)	Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 710 P.2d 1025 (1985)	Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 710 P.2d 1025 (1985)
ARKANSAS	YES	YES	NO
	Gladden v. Arkansas Children's Hosp., 292 Ark. 130, 728 S.W.2d 501 (1987)	Sterling Drug, Inc. v. Oxford, 294 Ark. 239, 743 S.W.2d 380 (1988)	Scholtes v. Signal Delivery Serv., Inc., 548 F. Supp. 487 (W.D. Ark. 1982)
CALIFORNIA	YES	YES	YES
	Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981)	Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980)	Cleary v. American Airlines, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980)
COLORADO	YES	YES	NO
	Continental Air Lines v. Keenan, 731 P.2d 708 (Colo. 1987)	Lampe v. Presbyterian Medical Center, 41 Colo. App. 465, 590 P.2d 513 (1978)	Pittman v. Larson Distrib. Co., 724 P.2d 1379 (Colo. Ct. App. 1986)
CONNECTICUT	YES	YES	YES
	Finley v. Aetna Life & Cas. Co., 202 Conn. 190, 520 A.2d 208 (1987)	Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980)	Magnan v. Anaconda Indus., Inc., 193 Conn. 558, 479 A.2d 781 (1984)

* In the absence of dispositive state law, federal cases construing state law have been cited.

DELAWARE	NO Heideck v. Kent Gen. Hosp., 446 A.2d 1095 (Del. 1982)	UNRESOLVED	UNRESOLVED
FLORIDA	NO Muller v. Stromberg Carlson Corp., 427 So. 2d 266 (Fla. Dist. Ct. App. 1983)	YES Smith v. Piezo Technology & Professional Adm'rs, 427 So. 2d 182 (Fla. 1983)	NO Muller v. Stromberg Carlson Corp., 427 So. 2d 266 (Fla. Dist. Ct. App. 1983)
GEORGIA	NO Garmon v. Health Group of Atlanta, Inc., 183 Ga. App. 587, 359 S.E.2d 450 (1987)	NO Evans v. Bibb Co., 178 Ga. App. 139, 342 S.E.2d 484 (1986)	NO Bendix Corp. v. Flowers, 174 Ga. App. 620, 330 S.E.2d 769 (1985)
HAWAII	YES Kinoshita v. Canadian Pac. Airlines, 724 P.2d 110 (Haw. 1986)	YES Parnar v. Americana Hotels, Inc., 65 Haw. 370, 652 P.2d 625 (1982)	NO Parnar v. Americana Hotels, Inc., 65 Haw. 370, 652 P.2d 625 (1982)
IDAHO	YES Harkness v. City of Burley, 110 Idaho 353, 715 P.2d 1283 (1986)	YES MacNeil v. Minidoka Memorial Hosp., 108 Idaho 588, 701 P.2d 208 (1985)	NO Holmes v. Union Oil Co., 760 P.2d 1189 (Idaho Ct. App. 1988)
ILLINOIS	YES Duldulao v. Saint Mary of Nazareth Hosp. Center, 115 Ill. 2d 482, 505 N.E.2d 314 (1987)	YES Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978)	NO Hugo v. Tomaszewski, 155 Ill. App. 3d 906, 508 N.E.2d 1139 (1987)
INDIANA	NO Shaw v. S.S. Kresge Co., 167 Ind. App. 1, 328 N.E.2d 775 (1975)	YES Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973)	NO Hamblen v. Danners, Inc., 478 N.E.2d 926 (Ind. Ct. App. 1985)
IOWA	YES Cannon v. National By-Prods., Inc., 422 N.W.2d 638 (Iowa 1988)	YES Abrisz v. Pulley Freight Lines, 270 N.W.2d 454 (Iowa 1978)	UNRESOLVED
KANSAS	YES Morriss v. Coleman Co., 241 Kan. 501, 738 P.2d 841 (1987)	YES Anco Constr. Co. v. Freeman, 236 Kan. 626, 693 P.2d 1183 (1985)	NO Morriss v. Coleman Co., 241 Kan. 501, 738 P.2d 841 (1987)

KENTUCKY	YES Shah v. American Synthetic Rubber Corp., 655 S.W.2d 489 (Ky. 1983)	YES Firestone Textile Co. v. Meadows, 666 S.W.2d 730 (Ky. 1983)	NO Wyant v. SCM Corp., 692 S.W.2d 814 (Ky. Ct. App. 1985)
LOUISIANA	UNRESOLVED	YES Turner v. Winn Dixie, Inc., 474 So. 2d 966 (La. Ct. App. 1985)	NO Frichter v. National Life & Accident Ins. Co., 620 F. Supp. 922 (E.D. La. 1985)
MAINE	YES Larrabee v. Penobscott Frozen Foods, Inc., 486 A.2d 97 (Me. 1984)	UNRESOLVED Pooler v. Maine Coal Prods., 532 A.2d 1026 (Me. 1987)	NO DeSalle v. Key Bank, 685 F. Supp. 282 (D. Me. 1988)
MARYLAND	YES Staggs v. Blue Cross, 61 Md. App. 381, 486 A.2d 798 (1985)	YES Adler v. American Standard Corp., 291 Md. 31, 432 A.2d 464 (1981)	NO Borowski v. Vitro Corp., 634 F. Supp. 252 (D. Md. 1986)
MASSACHUSETTS	YES Garrity v. Valley View Nursing Home, Inc., 10 Mass. App. Ct. 423, 406 N.E.2d 423 (1980)	YES DeRose v. Putnam Management Co., 398 Mass. 205, 496 N.E.2d 428 (1986)	YES Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977)
MICHIGAN	YES Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980)	YES Suchodolski v. Michigan Consol. Gas Co., 412 Mich. 692, 316 N.W.2d 710 (1982)	NO Cockels v. International Business Expositions, Inc., 159 Mich. App. 30, 406 N.W.2d 465 (1987)
MINNESOTA	YES Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983)	YES Phipps v. Clark Oil & Refining Corp., 408 N.W.2d 569 (Minn. 1987)	NO Hunt v. IBM Mid America Employees Fed. Credit Union, 384 N.W.2d 853 (Minn. 1986)
MISSISSIPPI	YES Robinson v. Board of Trustees of E. Cent. Junior College, 477 So. 2d 1352 (Miss. 1985)	YES Laws v. Aetna Fin. Co., 667 F. Supp. 342 (N.D. Miss. 1982)	UNRESOLVED Robinson v. Board of Trustees of E. Cent. Junior College, 477 So. 2d 1352 (Miss. 1985)
MISSOURI	NO Johnson v. McDonnell Douglas Corp., 745 S.W.2d 661 (Mo. 1988)	YES Beasley v. Affiliated Hosp. Prods., 713 S.W.2d 557 (Mo. Ct. App. 1986)	NO Neighbors v. Kirksville College of Osteopathic Medicine, 694 S.W.2d 822 (Mo. Ct. App. 1985)

MONTANA	YES	YES	YES
	MONT. CODE ANN. § 39-2-904(3) (1987)	Keneally v. Orgain, 186 Mont. 1, 606 P.2d 127 (1980)	Gates v. Life of Mont. Ins. Co., 196 Mont. 178, 638 P.2d 1063 (1982)
NEBRASKA	YES	YES	NO
	Johnston v. Panhandle Coop. Ass'n, 225 Neb. 732, 408 N.W.2d 261 (1987)	Ambroz v. Cornhusker Square Ltd., 226 Neb. 899, 416 N.W.2d 510 (1987)	Jeffers v. Bishop Clarkson Memorial Hosp., 222 Neb. 829, 387 N.W.2d 692 (1986)
NEVADA	YES	YES	YES
	Southwest Gas Corp. v. Ahmad, 99 Nev. 594, 668 P.2d 261 (1983)	Hanson v. Harrah's, 100 Nev. 60, 675 P.2d 394 (1984)	K Mart Corp. v. Ponsock, 103 Nev. 39, 732 P.2d 1364 (1987)
NEW HAMPSHIRE	UNRESOLVED	YES	YES
		Howard v. Dorr Woolen Co., 120 N.H. 295, 414 A.2d 1273 (1980)	Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974)
NEW JERSEY	YES	YES	NO
	Woolley v. Hoffman-La Roche, Inc., 99 N.J. 284, 491 A.2d 1257 (1985)	Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980)	McQuitty v. General Dynamics Corp., 204 N.J. Super. 514, 499 A.2d 526 (App. Div. 1985)
NEW MEXICO	YES	YES	NO
	Forrester v. Parker, 93 N.M. 781, 606 P.2d 191 (1980)	Boudar v. EG&G Inc., 105 N.M. 151, 730 P.2d 454 (1986)	Sanchez v. The New Mexican, 106 N.M. 76, 738 P.2d 1321 (1987)
NEW YORK	YES	YES	NO
	Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982)	N.Y. LAB. LAW § 740 (McKinney 1988)	Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983)
NORTH CAROLINA	NO	YES	NO
	Harris v. Duke Power Co., 319 N.C. 627, 356 S.E.2d 357 (1987)	Sides v. Duke Univ., 74 N.C. App. 331, 328 S.E.2d 818 (1985)	Walker v. Westinghouse Elec. Corp., 77 N.C. App. 253, 335 S.E.2d 79 (1985)

NORTH DAKOTA	YES	YES	NO
	Hammond v. North Dakota State Personnel Bd., 345 N.W.2d 359 (N.D. 1984)	Krein v. Marian Manor Nursing Home, 415 N.W.2d 793 (N.D. 1987)	Hillesland v. Federal Land Bank Ass'n, 407 N.W.2d 206 (N.D. 1987)
OHIO	YES	NO	NO
	Mers v. Dispatch Printing Co., 19 Ohio St. 3d 150, 483 N.E.2d 150 (1985)	Phung v. Waste Management, Inc., 23 Ohio St. 3d 100, 491 N.E.2d 1114 (1986)	Mers v. Dispatch Printing Co., 19 Ohio St. 3d 150, 483 N.E.2d 150 (1985)
OKLAHOMA	YES	YES	NO
	Langdon v. Saga Corp., 569 P.2d 524 (Okla. Ct. App. 1976)	Webb v. Dayton Tire & Rubber Co., 697 P.2d 519 (Okla. 1985)	Hinson v. Cameron, 742 P.2d 549 (Okla. 1987)
OREGON	YES	YES	UNRESOLVED
	Yartzoff v. Democratic-Herald Publishing Co., 281 Or. 651, 576 P.2d 356 (1978)	Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975)	
PENNSYLVANIA	YES	YES	NO
	DiBonaventura v. Consolidated Rail Corp., 372 Pa. Super. 420, 539 A.2d 865 (1988)	Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974)	Engstrom v. John Nuveen & Co., 668 F. Supp. 953 (E.D. Pa. 1987)
RHODE ISLAND	UNRESOLVED	YES	NO
	Roy v. Woonsocket Inst. for Sav., 525 A.2d 915 (R.I. 1987)	Cummins v. EG&G Sealol, Inc., 690 F. Supp. 134 (D.R.I. 1988)	Brainard v. Imperial Mfg. Co., 571 F. Supp. 37 (D.R.I. 1983)
SOUTH CAROLINA	YES	YES	NO
	Small v. Spring Indus., Inc., 292 S.C. 481, 357 S.E.2d 452 (1987)	Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219, 337 S.E.2d 213 (1985)	Satterfield v. Lockheed Missiles & Space Co., 617 F. Supp. 1359 (D.S.C. 1985)
SOUTH DAKOTA	YES	YES	NO
	Osterkamp v. Alkota Mfg., Inc., 332 N.W.2d 275 (S.D. 1983)	Many Statutory Sections	Breen v. Dakota Gear & Joint Co., 433 N.W.2d 221 (S.D. 1988)
TENNESSEE	YES	YES	NO
	Hamby v. Genesco, Inc., 627 S.W.2d 373 (Tenn. Ct. App. 1981)	Clanton v. Cain-Sloan Co., 677 S.W. 2d 441 (Tenn. 1984)	Whittaker v. Care-More, Inc., 621 S.W.2d 395 (Tenn. Ct. App. 1981)

TEXAS	YES Aiello v. United Air Lines, 818 F.2d 1196 (5th Cir. 1987)	YES Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733 (Tex. 1985)	NO McClendon v. Ingersoll-Rand Co., 757 S.W.2d 816 (Tex. Ct. App. 1988)
UTAH	YES Piacitelli v. Southern Utah State College, 636 P.2d 1063 (Utah 1981)	UNRESOLVED	UNRESOLVED
VERMONT	YES Sherman v. Rutland Hosp., Inc., 146 Vt. 204, 500 A.2d 230 (1985)	YES Payne v. Rozendaal, 147 Vt. 488, 520 A.2d 586 (1986)	UNRESOLVED
VIRGINIA	YES Thompson v. American Motor Inns, Inc., 623 F. Supp. 409 (W.D. Va. 1985)	YES Bowman v. State Bank, 229 Va. 534, 331 S.E.2d 797 (1985)	NO McGreevy v. Racal-Dana Instruments, Inc., 690 F. Supp. 468 (E.D. Va. 1988)
WASHINGTON	YES Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 685 P.2d 1081 (1984)	YES Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 685 P.2d 1081 (1984)	NO Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 685 P.2d 1081 (1984)
WEST VIRGINIA	YES Cook v. Heck's Inc., 342 S.E.2d 453 (W. Va. 1988)	YES Harless v. First Nat'l Bank, 162 W. Va. 116, 246 S.E.2d 270 (1978)	NO Speelman v. Smith's Transfer Corp., No. 85-1883 (4th Cir. May 22, 1986)
WISCONSIN	YES Ferraro v. Koelsch, 124 Wis. 2d 154, 368 N.W.2d 666 (1985)	YES Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834 (1983)	NO Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834 (1983)
WYOMING	YES Mobil Coal Producing, Inc. v. Parks, 704 P.2d 702 (Wyo. 1985)	NO Allen v. Safeway Stores, Inc., 699 P.2d 277 (Wyo. 1985)	UNRESOLVED Rompf v. John Q. Hammons Hotels, Inc., 685 P.2d 25 (Wyo. 1984)
TOTALS	YES - 41 NO - 6 UNRESOLVED - 3	YES - 43 NO - 4 UNRESOLVED - 3	YES - 9 NO - 34 UNRESOLVED - 7